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No. _____

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APR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
1987 Term

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S WRIT OF CERTIORARI and BRIEF IN SUPPORT

JAMIE E. COKER, pro se
1031 Gloria Road
Memphis, TN 38116

CERTIORARI SHOULD BE GRANTED

QUESTIONS TO REVIEW.

1. Whether the Court erred when finding that the Board properly computed the Petitioner's benefits due under the Railroad Retirement Act of 1974, 45 U.S.C. § 231, as amended;

2. Whether the Court erred in AFFIRMING the Board's decision of 45 U.S.C.§§ 228, 231:

a. When the Board and Court found certain cost-of-living increases ("COLAs") were not due Petitioner;

b. When the Board reduced Petitioner's annuity payment below the amount afforded him under the Railroad Retirement Act of 1937 or under the Social Security Act;

3. Whether Petitioner was denied due process when Petitioner's appeal was processed on a record which contained 147 "inaudibles".

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Jamie E. Coker v. R. A. Gielow, -- F.2d -- (6th Cir. 1987), Appendix "A", rendered December 3, 1986, AFFIRMED the Railroad Retirement Board's ("Board") computation of Petitioner's annuity benefits. The JUDGMENT was entered December 3, 1986, A True Copy, Appendix "B". ORDER DENYING PETITION FOR REHEARING was entered January 5, 1987, A True Copy, Appendix "C". ORDER DENYING MOTION TO RECALL THE MANDATE AND FOR REHEARING was entered February 11, 1987, A True Copy, Appendix "D".

JURISDICTION

Jurisdcition is founded upon 28 U.S.C. § 1332, for grievances arising under 45 U.S.C. § 231, and the Fourteenth Amendment to the United States Constitution.

FEDERAL RULES INVOLVED

Supreme Court Rule 17.1(c) prescribes that when a "federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court" due consideration should be given to granting certiorari.

STATEMENT OF THE CASE

Petitioner worked in the railroad industry for 23.25 years, ending in 1970. During this time, contributions were made to his retirement fund pursuant to the Railroad Retirement Act of 1937, formerly 45 U.S.C. § 228, et seq. Petitioner also engaged in work outside the railroad industry before railroad service. During a five year period, he also worked for the railroad and outside the railroad industry at the same time. Petitioner's Social Security account was

either contributed, or credited for this non-railroad work. As of January 1, 1975, the enactment date of the Railroad Retirement Act of 1974, 45 U.S.C. § 231, et seq. Petitioner had earned vested interests in two pension funds, the railroad's and Social Security's pensions. The Railroad Retirement Act of 1974 superseded the 1937 Act.

Since January of 1971, Petitioner has been continuously employed in non-railroad activity and during this 17 year period, has made contributions to his Social Security pension. As a result, to date Petitioner has 23.25 years of contributions to the railroad retirement plan and over 23 years of contributions to the non-railroad, or Social Security, retirement plan--for a total of 47 years.

STATEMENT OF THE FACTS

In May 1981, pursuant to 1974 amendments to the Railroad Retirement Act of 1937, Petitioner first became entitled to receive the benefits of his railroad retirement annuity. Once this award was received Petitioner questioned its calculation, claiming the annuity

amount had been improperly computed and based on errors of law and fact. After hearing on October 18, 1983, an administrative referee in a May 16, 1984 decision, found with limited exception, that the Agency's calculations were correct. This decision was summarily affirmed on October 22, 1984, by the three-member Board. The United States Court of Appeals, Sixth Circuit, affirmed the Board's decision on December 3, 1986, -- F.2d --, Appendix "A" and rehearing was denied on January 5, 1987, and again on February 11, 1987--"C","D".

REASONS FOR GRANTING WRIT

The questions presented have not been addressed by this Court. Research would reveal that there is only one circuit court of appeals decision on this subject, the case presently before the Court. This is surprising, however. While there is only a single petitioner before the Court, literally thousands of retirees from the railroad industry have been affected by the stance of the Board, and necessarily of the Sixth Circuit. The issues presented touch the most fundamental interest of these retirees--their very livelihood. Certitorari should be

granted due to these significant issues involved and to prevent an ACT of INJUSTICE.

ARGUMENT

The only Railroad Retirement plan Petitioner contributed to was under the 1937 Act. Under that Act, as it then existed, persons could, in essence, earn two full pensions; and, before its repeal, Petitioner had done just that. A person could work in the railroad industry until becoming a pension "vested" employee, and then work outside the industry, and, thus gain an additional pension through a private or public plan, usually Social Security. A person could reverse the order of employment, or also engage in both railroad and non-railroad activities concurrently, to achieve the same effect. Upon retirement, the worker would receive two full pensions--one from the railroad industry and another from Social Security.

In 1951, the Railroad Pension Fund became re-insured by the Social Security Administration. "The Social Security Act prohibits payment of multiple benefits to any individual under that Act. For this reason, whenever an individual

receiving Railroad Retirement benefits also qualifies for Social Security benefits, the amounts paid to the Railroad Retirement system under the financial interchange on account of that individual are reduced by the total of the Social Security benefits which that individual receives." S. Rep. No. 1163. 93rd Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 5702, 5703. This caused a disproportionate drain upon the Railroad Retirement Fund since a person would be entitled to Social Security benefits based upon relatively small contributions to that fund. This drain eventually resulted in a crisis and the fund was on the brink of bankruptcy. The Railroad Retirement Act of 1974 was designed to correct these fiscal problems. Appendix A-4. When doing so, Congress recognized that it would necessarily be required to eliminate benefits which were previously allowed.

An attempt was made to be as "equitable" in these "cuts" as possible. The major problem in accomplishing these objectives is that of "dual beneficiaries" retirees, as described

above, who had already earned two supposedly independent pensions prior to the enactment of the 1974 Act. The 1974 Act, accordingly, provided a scheme "intended to phase out the dual benefits in as equitable a manner as possible." Appendix A-5. It was decided that Congress would fund the future drain that dual vested retirees had on the system through separate funding. It is the Board's apparent misapplication of this scheme for which Petitioner complains.

The 1974 Act, first, had no substantive effect on employees already retired prior to its enactment. For instance, John Doe, who retired under the 1937 Act prior to 1975, would receive checks equal to a full railroad pension and a full Social Security pension.

For persons who as of 1975 were not entitled to dual pensions, the Act established, in effect, a tiering system for computing benefits. This is the primary means by which benefits are calculated and was the method by which the Board calculated the Petitioner's monthly annuity. While Petitioner contests numerous factual errors in the Board's computation, he

also realizes that certitorari will not be granted by this Court in order to address these inequities.

An additional method of computing benefits was made available to certain "dual vested" persons who still had a current connection with the railroad. This method discussed below, is to be used when it would provide greater benefits than the tiering system.

The first tier included payments for contributions due to all types of work, railroad and non-railroad. The contributions would be combined and a Social Security component applied. Using the Board's calculation as of October 1, 1984, Petitioner is said to be currently entitled to Gross Tier I benefits of $631.00 per month. This amount is reduced by an age reduction factor, $126.20, and, since Social Security employment is considered, Petitioner's equivalent Social Security entitlement of $404.00 is also subtracted from Tier I benefits. After reduction, Petitioner's net Tier I benefits equal only $100.80.

The second tier consists solely of a

railroad-related component. This is, in essence, the same amount a retiree was entitled to under the 1937 Act as a supplemental benefit. Again, while Petitioner contests its calculations, the Board has determined this amount to be $19.18.

An additional tier is available to certain "dual vested" retirees. This tier is designed to replace at least some of the dual-benefits eliminated by the 1974 Act; and, apparently for want of a better term, the tier is called a "windfall benefit." This tier considers only work performed prior to the effective date of the 1974 Act, and compares railroad work and combined work, and subtracts the difference from a component considering only Social Security contributions. The Board has calculated the Petitioner's "windfall" benefit as $114.09. Using the Board's own calculations, Petitioner is entitled to a total railroad annuity of $234.07, as of October 1,1984.

Petitioner contests the appropriateness of the Board's reduction of Petitioner's annuity, when using the tiering system, below the

guaranteed amount set forth in the Act, 45 U.S.C. § 231b(a) states:

> The annuity of an individual under section 2(a)(1) of this Act [the tiering system] shall be in an amount equal to the amount . . . of the old-age insurance or disability insurance benefit to which such individual would have been entitled under the Social Security Act. . . .

The Social Security Administration has established that Petitioner is entitled to old-age retirement benefits in the amount of $404.00. As the evidence would reflect, the Board's calculations reduced Petitioner's Tier I RAILROAD annuity below this threshold amount. There is a vast difference in reducing the Social Security benefits from the COMBINED annuity and the RAILROAD annuity as reflected in the findings of the Court, A-3; further, his Social Security should not affect the amount of his RAILROAD retirement annuity. Appendix A-8. The difference is found in the words COMBINED, meaning combination of railroad and non-railroad work, while RAILROAD annuity refers only to pension earned while working in the railroad industry 23.25 years.

Likewise, "Subdivision (2) of subsection (f) guarantees that, in cases where an employee's annuity under the new Act began to

accrue before January 1, 1983, the total of the annuities (other than amounts payable under subsection (h)) and supplemental annuity payable to the employee and his spouse for any month under the new Act (before any reduction due to receipt of social security benefits and before any reduction pursuant to the earnings limitations provisions of section 2(f) of the new Act) cannot be less than the total amount that would have been payable to the employee and his spouse for that month under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, on the basis of the maximum monthly compensation creditable at that time." S. Rep. NO. 1163, 93rd Cong. & Admin. News 5702, 5734. Petitioner was entitled, as of December 31, 1974, to an annuity based upon 1937 computations in the amount of $309.00. Appendix A-9. The Board's award of $234.07 is clearly below this amount. As shown above, the amount under subsection (h), $114.09, is not to be included in the $234.07, but the calculations as shown amounting to net Tier I, $100.80, plus

supplemental annuity, $19.18, includes the $114.09 in the $234.07 amount making it far below the $309.00 railroad guaranty amount.

The second method of calculation of benefits is available only to certain retirees. A judicial determination has been made that Petitioner qualifies for such status. Appendix A-8. Under this system, a retiree is in essence, entitled to benefits as if he had retired under the 1937 Act. 45 U.S.C. § 231b(f)(2) states inter alia:

> [If computation using the tiering method] is less than the total amount which could have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974. . . the annuity of such individual and the annuity of such spouse, if any, shall be increased, without regard to the provisions of subsection (1) of this subsection, proportionately so as to equal such total amount.

Under the 1937 Act, Petitioner would be entitled to, under the Board's calculations, a Railroad Retirement annuity in the amount $309.00. Appendix A-9. Petitioner would also

be entitled to a supplemental benefit again based solely on railroad service. As outlined above, this amount, at a minimum, would equal $19.18. Plus, under the 1937 Act, Petitioner would be entitled to a full Social Security pension in the amount of $404.00 for a collective "dual" benefit of $732.18. As clearly may be seen, this amount is far more than the total benefits now being paid Petitioner, $638.07; and, therefore, annuity should have been calculated on this basis.

Markedly absent from this calculation are cost-of-living adjustments, or "COLAs". It is the lower court's opinion, along with that of the Board, that cost-of-living increments are not to be computed on these funds. The lower court found authority in the phrase "as in effect on December 31, 1974". Appendix A-9; see, 45 U.S.C. § 231b(f)(2). Such an interpretation is curious to say the least. There was no cost-of-living increments in place as of December 31, 1974. COLAs were first legislated by Congress in 1975 for the purpose of providing equal buying power to all retirees, and for adjusting for the

effects of inflation. Persons retiring prior to enactment of the 1974 Act received cost-of-living adjustments. It is absolutely clear from a reading of the legislative history of the 1974 Act that those select persons retiring under 45 U.S.C. § 231b(f)(2), which is cited above are entitled to treatment as if they retire under the 1937 Act. Discrimination between this two classes of retirees has no "reasonable basis in law". Brotherhood of RR Trainmen on the Mongahelia Connecting RR Co. v. Railroad Retirement Board, 410 F2d 353, 357 (3rd Cir. 1969).

Contrary to the Board's position, the former 45 U.S.C. § 209 require COLAs to be added to any railroad annuity:

> Whenever monthly insurance benefits under section 202 of the Social Security Act are increased, the amount of each annuity provided by section 202(a), section 203(a), paragraph (1) of section 204(a), paragraphs (1) and (2) of section 207 shall be increased in the same manner, and effective the same date as other annuities of the same type payable under section 2 of the Railroad Retirement Act of 1974 are increased.

In fact, the evidence would reflect that the Secretary of the Treasury is currently transferring to the Railroad Retirement Board

funds equivalent to the COLAs due upon Petitioner's 1937 annuity of $309.00. These funds are not, however, being forwarded to the Petitioner. More accurately, today the Railroad Retirement Board receives $920.09 through the interchange with the Secretary of the Treasury and the Social Security Administration, yet Petitioner's monthly payment is only $676.54.

Further, Petitioner's annuity is improperly being reduced by the 1981 and 1983 amendments to the 1974 Act. Both amendments contained Benefit Preservation Sections. Public Law 97-35, 1981 Amendment states:

> Sec. 1129. (a) Except as otherwise provided in this section, the amendment made by this subtitle shall take effect October 1, 1981, and shall apply only with respect to annuities awarded on or after that date.

Likewise, the 1983 amendments contained similar language. See Public Law 98-76, quoted in Appendix, E-2; also Public Law 96-582, 1981 Amendment, effective June 1, 1981, quoted in Appendix, E-1, which the Agency did not award to Petitioner.

There has been a prior judicial determination that Petitioner was paid benefits from

May 1, 1981. The Circuit Court stated: "Coker filed his claim for early railroad retirement benefits in May, 1981 (the month he turned sixty-two), and was awarded an annuity." Appendix, A-4. The Board applied a 20% age reduction penalty to his annuity, only applicable in month of May as required in 1974 Act, 45 U.S.C. § 231a 2(a)(1)(iii) quoted in Appendix E-1. Obviously the Board is using the date of their final decision as an award date, which is improper.

Additionally, Petitioner was denied his due process rights by being required to prosecute his appeal based upon a transcript containing a substantial number of "inaudibles". The short transcript contained at least 147 "inaudibles". Whole sentences were not transcribed, leaving the court to merely assume the context of what was said. Due process requires that Petitioner have made available to him a record for which he may prosecute a claim.

CONCLUSION.

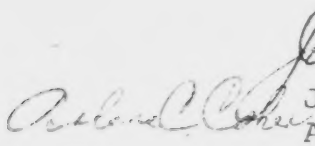
It is inconceivable that Petitioner has worked to date some 47 years (1940-1987) and

continuing to work and pay Social Security Self-Employment taxes each year, but is paid only $676.54, FULL pension annuity for the COMBINED railroad and non-railroad retirement taxes he paid for a life time of work. Plus, the fact that the lower court found he is not due the cost-of-living increases legislated and funded by Congress for all retirees whatever law they retired under. What is even more inconceivable is the fact the Petitioner is required to pay Social Security Self-Employment Retirement Taxes for the rest of the years he continues to work, but has no hope of ever receiving any benefits for the taxes he pays, yet the Social Security Administration pays the benefits to the Railroad Retirement Board but the Board does not pass on to Petitioner. It is unconstitutional to require Petitioner to pay retirement taxes on which he gets no benefit.

Substantial issues affecting numerous claimants are presented by way of this PETITION for CERTIORARI. These issues have not properly been addressed by any circuit

court of appeals. For the above reasons, CERTIORARI should be GRANTED so that the parties could be given an opportunity to more adequately brief the issues presented.

Respectfully submitted,



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APPENDIX

Decision, December 3, 1986. . . . . ."A" 1-11

Judgment, December 3, 1986. . . . . "B"

Order Denying Rehearing
January 5, 1987. . . . . "C"

Order Denying Recall
for Mandate and Rehearing. . . . . "D"

Statutes:

"Benefit Preservation"
45 U.S.C. § 231b (ℓ) P.L. 97-35 "E"-1
45 U.S.C. § 231d P.L. 98-76 . . "E"-2

Age Reduction Penalty
45 U.S.C. 231a 2(a)(1)(iii). . . . "E"-1

Tier II increase, June 1, 1981
45 U.S.C. § 231b (g) P.L. 96-582 . "E"-1

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-3864

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMIE E. COKER,
Petitioner,

v.

R.A. GIELOW, Chairman; C.J. CHAMBERLIN, Member; J.O. CRAWFORD, Member; MICHAEL ALTMANN, Executive Officer; and UNITED STATES RAILROAD RETIREMENT BOARD,
Respondents.

ON PETITION to Review a Decision of the United States Railroad Retirement Board.

Decided and Filed December 3, 1986

Before: MARTIN, GUY and NORRIS, Circuit Judges.

GUY, Circuit Judge. Claimant, Jamie Coker, appeals from the decision of the Railroad Retirement Board, contending that the Board improperly computed the amount of his annuity. Finding no error in the computations, we affirm.

Plaintiff essentially argues (1) that his social security benefit amount of $404.00 granted upon his application at age 65, rather than his previous early retirement award of only

$279.00, should have increased his railroad retirement annuity proportionately; and (2) that as a "dual vested employee" he is entitled to receive his railroad annuity without reduction for social security benefits or, in the alternative, at no less than the amount he would have received from both his railroad retirement *and* social security under the provisions of the Railroad Retirement Act of 1937.

The various changes in claimant's annuity computation since the filing of his claim in 1981 are too numerous to set forth and not essential to this appeal. It will suffice to say that claimant's total monthly benefit amount at the time of the final decision from the Railroad Retirement Board (the Board) on October 22, 1984, was $638.07, and he claims his correct amount should range anywhere from $714.40 to $906.60.

I. Factual and Procedural History

Plaintiff last worked for the railroad in 1971 after twenty-three and one-half years of service. By December 31, 1974, he also had earned wages in the requisite number of quarters for coverage under the Social Security Act.

In 1971, when Coker terminated his employment with the railroad, he was covered under the Railroad Retirement Act of 1937, 45 U.S.C. § 228(a) *et seq.* (amended 1974), which allowed an individual with at least ten years of employment with the railroad and sufficient work to establish eligibility under the Social Security Act, 42 U.S.C. § 401 *et seq.*, to draw benefits under both systems. This situation resulted in higher benefit payments to those qualifying under both systems than were received by those with the same years of work experience, but all under one system.[1] In an attempt to eliminate

[1]For example, if 10 years of either railroad or non-railroad employment would produce a monthly benefit of $300.00, an additional 10 years of the same employment at the same level of creditable compen-

this dual benefit windfall, Congress passed the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*, which fundamentally restructured the railroad retirement system. It established a two-tier system of benefits, the first tier composed of the employee's combined railroad and non-railroad employment figured at social security rates (the equivalent of a straight social security benefit). *See* § 231b(a). This tier comprises the bulk of the final annuity amount. The second tier provides an additional amount based on railroad service alone. *See* § 231b(b). Finally, for those employees who qualify under § 231(b)(h) of the Act, an additional benefit, called a "vested dual benefit," is provided which, in essence, partially compensates those persons who were eligible for dual benefits under the former Act.[2]

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sation would not double that benefit, but would increase it by some lesser amount to say $500.00. If that 20 years of service had been divided equally between railroad and non-railroad employment, however, the social security benefit would be $300.00 and the railroad retirement benefit would also be $300.00, for a total benefit of $600.00. The $100.00 difference constitutes the "windfall" benefit. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 168 n.1 (1980). *See generally*, S. Rep. No. 1163, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 5702, 5704.

[2]To attain the status of a vested employee, § 231b(h)(1)(A) requires an individual to have:

> (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 231a(a)(1) of this title began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act [42 U.S.C.A. § 301 *et seq.*] on December 31, 1974, ...

Claimant was determined to have a "current connection" with the railroad on December 31, 1974, pursuant to § 231b(h)(1)(A)(ii) and to satisfy the remaining criteria for eligibility for vested dual benefits under this subsection.

A-3

Coker filed his claim for early railroad retirement benefits in May, 1981 (the month he turned sixty-two), and was awarded an annuity. A few months later, he filed for and began receiving social security benefits of $279.00 per month, which amount was deducted from his railroad annuity. Due to his dissatisfaction with the amount of his benefits, he wrote or called the agency several times to protest their computations.[3] He also revoked his early social security retirement.

Plaintiff subsequently challenged the computation of his benefits and on October 18, 1983, a hearing was held. The decision of the referee, dated May 16, 1984, addressed two issues—whether claimant's annuity was subject to earnings deductions, and whether the amount of his annuity had been properly computed. She found that his annuity was subject to deductions for earnings and that his benefit amount was proper. He appealed this decision to the Railroad Retirement Board, informing them that he had reapplied for social security in May, 1984 (the month he turned sixty-five), and was currently drawing $404.00 per month. The Board issued its decision affirming the appeals referee on October 22, 1984, from which claimant takes this appeal pursuant to the provisions of § 231(g) of the Act.

II. The Railroad Retirement Act of 1974

The legislative history of the Act shows that Congress' purposes in restructuring the 1937 Act were twofold: first, to ensure the fiscal soundness of the railroads and, second, to establish equitable retirement benefits for all railroad employees. The major problem in accomplishing these objec-

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[3]At various points, claimant has protested deductions from his benefits due to his receipt of self-employment income and/or social security benefits, lack of cost of living increases, and benefit cutbacks mandated by the legislature, as well as asserting misapplication and/or misinterpretation of the law by the Agency.

tives was that of "dual beneficiaries," those retirees who were eligible for benefits under both the Railroad Retirement Act and the Social Security Act. These beneficiaries caused a proportionately greater drain on the railroad retirement system than on the social security system. The Senate Report specifically found that "were it not for the problem of dual beneficiaries, the railroad retirement system would be almost completely solvent." S. Rep. No. 1163, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5702, 5708. Therefore, the Act was intended to phase out these dual benefits in as equitable a manner as possible.

Section 231b(h) sets forth the method for computing the allowable dual benefit for those eligible employees specified in that section.[4] Basically, the amount of this "vested dual benefit" is computed by adding the amount of social security benefits to which an individual would have been entitled based solely on his railroad service and those based solely on his non-railroad service, and subtracting an amount based on a combination of both social security wages and railroad compensation effective December 31, 1974. The remaining amount is subject to cost of living in increments up to the time of actual retirement, when this benefit amount is frozen. *All* vested employees retiring after December 31, 1974, receive some amount of dual benefits to compensate for § 231b(m), which mandates full reduction for any monthly benefit payable under the Social Security Act.

The annuity amounts payable to all employees retiring after December 31, 1974, are to be computed under § 231b[5] with one possible exception. Section 231b(f)(2), a so-called "grandfather clause," mandates that no employee drawing under the new Act will draw less than he would have been

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[4] *See supra* n.2.

[5] "Section 3 (45 U.S.C. § 231b) specifies the benefits that will be payable to railroad employees *who retire after December 31, 1974....*" S. Rep. No. 1163, *supra*, n.1, at 5715 (emphasis added).

entitled to under the provisions of the Railroad Retirement Act of 1937.

This complex mechanism ensures the eventual phase out of dual beneficiaries and brings the annuity entitlement of railroad employees in line with the benefits available to those drawing under Title II of the Social Security Act. While it admittedly distinguishes between former retirees, those with "vested" rights, and those future retirees ineligible for any dual benefit, the Supreme Court has upheld these classifications since railroad retirement benefits, like social security benefits, are not contractual and may be altered or even eliminated by Congress at any time. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980). Therefore, no impermissible discrimination results from the elimination of dual benefits for future retirees covered by the Railroad Retirement Act of 1974.

III. Standard of Review on Appeal

Section 8 of the Railroad Retirement Act of 1974 (45 U.S.C. § 231g) incorporates the judicial review provisions of the Railroad Unemployment Insurance Act (Section 5(f); 45 U.S.C. § 355(f)), and thereby specifically provides that "[t]he findings of the Board as to the facts, if supported by the evidence and in the absence of fraud, shall be conclusive." The law is well settled that a decision of the Railroad Retirement Board regarding entitlement to benefits under the Railroad Retirement Act or the Railroad Unemployment Insurance Act is not to be set aside on judicial review if it is supported by substantial evidence in the record and is not based on an error of law. *Chandler v. Railroad Retirement Board*, 713 F.2d 188, 189 (6th Cir. 1983); *Ogle v. Railroad Retirement Board*, 238 F.2d 233, 234 (6th Cir. 1956). Thus, in order to determine whether there has been an error of law resulting in an improper award of benefits to the plaintiff, we are required to engage in an interpretation of the relevant portions of the Railroad Retirement Act of 1974.

In connection with this task, we note that Congress has given to the Railroad Retirement Board the responsibility of administering the Act. 45 U.S.C. § 231f. The determination of which individuals are entitled to benefits under the Act, and the amount of those benefits, comprises a major portion of the Board's duties. The United States Supreme Court has stated that "[i]t is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers of the agency charged with its administration.'" *Environmental Protection Agency v. National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980) (citation omitted). A reviewing court is to be guided by the principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. *E. I. du Pont de Nemours and Company v. Collins,* 432 U.S. 46 (1977); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U.S. 367 (1969). Therefore, the Board's interpretation should be upheld if it is not fundamentally inconsistent with the language and purpose of the statute. *Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979); *NLRB v. Iron Workers,* 434 U.S. 335 (1978); *Brotherhood of Railroad Trainmen v. Railroad Retirement Board,* 410 F.2d 353 (3d Cir. 1969).

IV. Plaintiff's Allegations of Error

A. *The effect of plaintiff's increased social security on his railroad annuity.*

We turn now to plaintiff's first assignment of error; namely, that his award of monthly social security benefits of $404.00, rather than the previously determined $279.00, should have resulted in a corresponding increase in his annuity. Section 231b sets out the method for determining an individual's annuity amount. Claimant elected to begin drawing his railroad annuity at age sixty-two rather than waiting until he turned sixty-five. Therefore he suffers an age reduction in his

benefit amount as prescribed by statute. The Board's computations show that he has received all cost of living increases to which he was entitled under the Social Security Act (42 U.S.C. § 415(i)) as applied to both his Tier I benefits and his vested dual benefits. Furthermore, § 231b(m) specifically provides that:

> The annuity of any individual under subsection (a) of this section for any month shall . . . be reduced, but not below zero, by the amount of any monthly benefit . . . payable to that individual for that month under Title II of the Social Security Act (42 U.S.C. § 401 *et seq.*).

45 U.S.C. § 231b(m).

We discern no supportable basis in petitioner's claim that the amount of his social security benefits should affect the amount of his railroad retirement annuity. Rather, the opposite conclusion prevails. His annuity amount was computed under the formula specified in the 1974 Act, and that amount, once established, is clearly subject to *full* reduction for future social security entitlement. It is this feature of the Act that operates most conclusively to bring railroad annuities in line with those which would have been payable under the social security system, a goal clearly established by the legislative history of the 1974 Act. Therefore, we find claimant's first objection to be without merit.

B. *Plaintiff's entitlement as a "dual vested employee" under the Act's "grandfather clause."*

As we understand this portion of claimant's argument, he focuses on § 231(f)(2) as support for his contention that he is guaranteed an amount not less than he would have been entitled to had he retired under the Railroad Retirement Act of 1937. This section specifies, in relevant part:

> If, in the case of an individual whose annuity under section 2(a)(1) of this Act began to accrue prior to

> January 1, 1983, the annuity (before any reduction due to such individual's entitlement to a monthly insurance benefit under the Social Security Act and disregarding any amount provided by subsection (h) of this section) ... is less than the total amount which would have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, ... the annuity of such individual ... shall be increased ... so as to equal such total amount.

45 U.S.C. § 231b(f)(2).

Addressing this argument, the appeals referee specifically found that claimant would have been entitled to a railroad annuity of $309.00 under the provisions of the 1937 Act. Since this amount was less than his applicable annuity rate of $523.98 figured under the provisions of the 1974 Act, he was awarded the higher amount.

Claimant argues for an interpretation of the "grandfather clause" which would allow for payment of not only the 1937 Act amount of $309.00 but accumulated cost of living increases on this amount since 1974 plus his social security benefits, for a total monthly benefit in excess of $900.00. He contends that since this combined sum is greater than his benefit amount under the new Act, he is entitled to the larger amount under this clause.

With regard to the argument for accumulation of cost of living increments, the clause specifically provides that the computation be made under "the provisions of the Railroad Retirement Act of 1937 *as in effect on December 31, 1974.* 45 U.S.C. § 231b(f)(2) (emphasis added). The statutory language clearly restricts the computation to that amount payable as of December 31, 1974, thereby barring allowance for cost of living increases declared subsequent to that date.[6] Therefore, we find this argument without support.

---

[6] "Thus, the guaranty amount derived from the provisions of the 1937 Act is *confined* to the amount that would have been payable under that

Finally, plaintiff urges an interpretation of the "grandfather clause," § 231b(f)(2), which would mandate a computation based on the aggregate of his railroad annuity *plus* his social security. We note that the Board has interpreted this clause as allowing for consideration of only railroad compensation and years of service, *excluding* those wages compensable under the social security system.

In reviewing the legislative history for clarification of the purpose and effect of this clause, we find an indication of Congressional intent in a statement contained in the Senate Report, explaining that the clause "would insure that no employee retiring within the next eight years will receive less than he would under the formula as it exists today *computed under the current limit on creditable compensation.*"[7] Creditable compensation under the 1937 Act is limited to that paid to employees of "an express company, sleeping-car company or carrier by railroad." 45 U.S.C. § 228a, subsections (a), (h)(1), and (m), *amended by* 45 U.S.C. § 231 *et seq.* This statement clearly supports the Board's interpretation of § 231b(f)(2) as requiring that the computation under that clause be limited to the amount payable based on railroad earnings alone.

To adopt the interpretation urged by the claimant would allow all employees retiring prior to January 1, 1983, to combine the most favorable elements of *both* Acts to yield the highest possible annuity. However, the clearly expressed Congressional intent in enacting the Railroad Retirement Act of 1974 was the gradual elimination of dual beneficiaries, with

---

Act *as of* December 31, 1974 . . . ." S. Rep. No. 1163, *supra*, n.1, at 5735 (emphasis added).

[7]"Indeed, most career railroad employees retiring in the next several years should receive somewhat more benefits if the bill is enacted than they would have received under the old formula as so computed." S. Rep. No. 1163, *supra*, n.1, at 5717.

the "grandfather clause" inserted to ensure only that no retiree drawing under the system as combined receives less than he would have drawn in railroad benefits alone under the former Act.

After review of claimant's remaining objections to his annuity computation, we find that the conclusions reached by the Board and reflected in the calculation of claimant's benefit amount are supported by a reasonable basis in law. Claimant has been found eligible for and granted a "windfall" benefit under § 231b(h) of the Act in the form of a "vested dual benefit," which he is currently receiving in addition to the Tier I and II benefits provided all retirees under §§ 231b(a) and (b). Since we find no error of law in the findings of the Board, its decision is AFFIRMED.

FILED
Dec 3 1986
John P. Hehman,
Clerk

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

NO. 85-3864

JAMIE E. COKER,

Petitioner,

v.

R. A. GIELOW, Chairman, et al., and
UNITED STATES RAILROAD RETIREMENT BOARD

Respondents.

Before: MARTIN, GUY and NORRIS, Circuit Judges.

J U D G M E N T

ON PETITION TO REVIEW a decision of the United States Railroad Retirement Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby affirmed.

It is further ordered that Respondents recover from Petitioners the costs, as itemized below.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John H. Hehman
Clerk

A True Copy

Issued as Mandate: January 13, 1987

COSTS: None
Filing fee.....$
Printing.....$
Total.....$

Attest:
Gary McCarthy
Deputy Clerk

A True Copy
Arlene C. Coker
Arlene C. Coker, Wife
Attorney-in-Fact

"B"

NO. 85-3864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 5 1987
John P. Hehman,
Clerk

JAMIE E. COKER,

Petitioner,

v.

ORDER DENYING
PETITION FOR REHEARING

R.A. GIELOW, Chairman; C.J. CHAMBERLIN, Member; J.O. CRAWFORD, Member; MICHAEL ALTMANN, Executive Officer, and UNITED STATES RAILROAD RETIREMENT BOARD,

Respondents.

_____/

Before: MARTIN, GUY, and NORRIS, Circuit Judges.

The petitioner has filed a timely motion for a rehearing. Upon a review of the petitin, we conclude that it raises the same issues as were raised in the original hearing and which were considered by the court. Accordingly, the petitioner's motion for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

A True Copy.

Attest: Arlene C. Coker
Arlene C. Coker, Wife and
Attorney-in-Fact

"C"

No. 85-3864

F I L E D

Feb. 11,1987

John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. COKER, :

Petitioner, :

vs. : O R D E R

R.A. GIELOW, CHAIRMAN, ET AL., :

Respondents :

Upon consideration of the petitioner's motion to recall the mandate and for rehearing of the above-entitled case,

IT IS ORDERED that the motion be, and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John P. Hehman

A True Copy.

Attest:

Arlene C. Coker

Arlene C. Coker, Wife and
Attorney-in-Fact

"D"

45 U.S.C. 231b (l)
(1) Reductions for increased annuities (1) Except as provided in subdivision (2) of this subsection, if an annuity awarded under section 2(a)(1)(iii)... is increased or decreased either by a change in the law or by a recomputation, the reduction on account of age in the amount of such increase or decrease shall be computed...

(2)The reduction required under section 2(a)(1)(iii)... may be applied separately to each of the annuity amounts computed under subsections (a),(b), and (h) of this section...For this purpose, in any case in which an annuity amount was computed for an individual under the provisions of this Act or of Public Law 93-445 prior to October 1, 1981, an annuity amountcomputed under subsections (a),(b),(c),(d) and (h) of this section, ... and section 204 or 206 of Public Law 93-445 shall be reduced by its proportionate share of the reduction on account of age..."

45 U.S.C. 231a 2(a)(1)(iii)

"(iii) Individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individual shall be reduced by 1/180 for each calendar month that he or she is under age sixty-five when the annuity begins to accrue.

"Public Law 96-582 - To amend the Railroad Retirement Act of 1974 to extend certain cost-of-living increases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Railroad Retirement Act of 1974 is amended by inserting (2) after "g" and by inserting at the end thereof the following new subdivision:
"(2) Those portions of the annuity of an individual as are computed under subsections (b)and(h) of this section shall, if such individual's annuity under section 2(a)(1) of this Act began to accrue on or before June 1, 1981, be increased by 32.5% per centum of the percentage increase, if any...The increase provided under this subdivision shall be effective on June 1, 1981."

45 U.S.C. §231d - 1983 Amendment P.L. 98-76

"Sec. 103(a) Section 5(a) of the Railroad Retirement Act of 1974 is amended--

(1) by striking out "An annuity" at the beginning and inserting in lieu thereof "Subject to the limitations set forth below, anannuity";

(2) by amending paragraphs (ii) and (iii) to read as follows:

(ii) NOT APPLICABLE

"(iii) in the case of an applicant otherwise entitled to an annuity under section 2(a)(1)...where paragraph (ii) does not apply, not earlier than the latest of (A) the first day of the sixth month before the month in which the application therefor was filed, (B) the first day of the month in which the application therefor was filed if the effect of beginning such annuity in an earlier month would result in a greater age reduction in the annuity...

(D) in the case of an applicant otherwise entitled to an annuity under section 2(a)(1)...the first day of the first month throughout which the applicant meets the age requirement for the annuity applied for;"

"Sec. 103(b) The amendments made by this section shall become effective on the first day of the first month beginning after the date of the enactment of this Act, and shall APPLY ONLY WITH RESPECT TO ANNUITIES AWARDED ON THE BASIS OF APPLICATIONS FILED ON OR AFTER THAT DAY."

DATE OF ENACTMENT, August 12, 1983
EFFECTIVE DATE, September 1, 1983

86 1671

(2)

Supreme Court, U.S.
FILED
MAY 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1671

IN THE SUPREME COURT OF THE UNITED STATES
1987 Term

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S WRIT OF CERTIORARI SUPPLEMENTAL BRIEF and SUPPLEMENTAL APPENDIX IN SUPPORT

JAMIE E. COKER, pro se
1031 Gloria Road
Memphis, TN 38116
(901) 398-1234

No. 86-1671

IN THE SUPREME COURT OF THE UNITED STATES

JAMIE E. COKER,
Petitioner

v.

R. A. GIELOW, Chairman of the
Railroad Retirement Board, et al.,
and
the UNITED STATES RAILROAD
RETIREMENT BOARD

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL ARGUMENT

In 1982, Petitioner began making appeals to the Railroad Retirement Board about the annuity paid him under the 1974 Tiering System instead of as the Law required under the 1937 Act, which was the Act he retired under when he left the railroad prior to 1971. On October 18, 1983, the Board granted a hearing on his appeal, which Petitioner blindly accepted as required under Federal Law and Regulations. To the contrary, the Board has never afforded the Petitioner a hearing which is required under 20 CFR §§ 258 and 259, if there is a dispute concerning the status of the employee relating to which Law Petitioner's annuity should be computed - the 1937 Act or the 1974 Act.

20 CFR § 258.1 Hearings:

> "(a) To such extent as may be necessary to determine (1) the employee status of any individual. . .(3)any other matter arising out of or necessary for the administration of the Railroad Unemployment Insurance Act and the Railroad Retirement Acts of 1935, 1937, and 1974, other than matters specically provided for in Parts 260 and 320 of this chapter, the Board may itself or through one of its members or a designated examiner, conduct hearings, require and compel the attendance of witnesses and the production of records and documents, administer oaths, take testimony, make all pertinent investigations and findings of fact, and render decisions upon such findings.
>
> (b) Where the Board determines that an oral hearing is necessary to the determination of a matter before it, the Board shall notify all parties to the proceeding that a hearing will be conducted, and, if the hearing is to be before a single Board member or a designated examiner, the notice shall identify the member or examiner authorized to conduct the hearing."

The above requirements were not met. Parts 260 and 320 are hearings conducted by an Appeals Referee where the appeals are on reconsiderations of Bureau of Retirement Claims, etc., pertaining to computations only. Attachment 1, pages 1-8, decision of Appeals Referee on the only oral hearing Petitioner had, show the two issues considered were only computations; nothing to do with Law he is under, since the Board has failed to set a hearing to determine the status of Petitioner, whether he should be computed, 1937 or 1974 Act. It was evident during the hearing Ms. Grace Koester, Appeals Referee

had little knowledge of the 1937 Act. She was not aware until Petitioner inquired, there should have been a comparison made of annuity due him under the 1937 Act with amount due under the 1974 Act. She searched through the file and found none. The comparison should have been made, to pay him the higher amount, prior to payment of first annuity check. She said she would include this in her decision, which was not made until some seven months later, May 16, 1984. A-1, pages 7-8 is the comparison attempted by the referee. She computed under the 1937 Law Petitioner was due a railroad pension alone of approximately $309.00 on December 31, 1974, which included no cost-of-living increases and no social security benefits. She compared the $309.00 amount with the $523.98 she computed under the 1974 Act which included all cost-of-living increases from 1975 through 1983 and also included $279.00 in social security benefits. This must be considered by the Court as a most irrational comparison--like comparing apples and oranges. Prior to hearing, calculations had not been furnished Petitioner, other than an award sheet showing the results of calculations, but

not how the amounts were reached. The information did, however, reflect Petitioner's annuity was computed under the 1981 and 1983 Reduction Amendments, not effective until after annuity award was computed and paid. Petitioner has been requesting since 1982 to date that the Board furnish him all of his file, under 5 U.S.C. §552. The Board to date has failed to do this.

20 CFR § 258.5 Exhibits states:

> "Copies of all exhibits admitted in evidence at any hearing held pursuant to the provisions of this part shall be furnished by the party offering the same to all other parties participating in the proceedings."

The referee had Petitioner's file, but failed to make documents available to him. Petitioner held in hand at hearing a pamphlet furnished him by the Union after he left the railroad in 1970. The pamphlet, dated December 1974, was compiled by Bureau of Research for the Railroad Retirement Board. The referee had never before seen the document. She made a copy of it. Petitioner kept reading from it, since it was basically all the documentation he had to substantiate his argument. He felt since the Board had published it, it must be true. It stated:

> "RAILROAD RETIREMENT ACT OF 1974. . .
> A GRANDFATHER CLAUSE guarantees that employees and their wives retiring during the eight years

following the changeover date of January 1, 1975, will receive no less than the amounts that would have been payable under previous law, excluding social security benefits."

The referee kept saying the pamphlet did not mean that, but meant a windfall amount would be paid to partially offset the social security benefits lost. She commented it was regrettable Petitioner had been misled by the pamphlet.(A-1, page 8) It was apparent the referee was very confused about 45 U.S.C. §231b(f)(2), "Grandfather Clause" which guaranteed under the 1974 Law he was to be paid the same amount due him under the 1937 Act, with no provision made for a partial payment as the referee found on page 6 of A-1 "replaces in part". Petitioner was due the same amount paid in one check under the 1974 Act as he would have been paid in two checks under the 1937 Act, as he was a Dual-vested employee with a current connection. 20 CFR § 258.6 states:

"(a) Where an examiner has been designated by the Board under this part to conduct a hearing with respect to a matter before it, the examiner shall preside at the hearing and shall cause all testimony to be recorded. The examiner shall, as soon as practicable following the conclusion of the hearing, mail to each party. . . a free transcript of the record of the proceedings had before the examiner. Thereafter the examiner shall give the parties participating in the hearing the opportunity to present argument upon

> both law and facts. Upon conclusion of the proceedings before him or her, the examiner shall prepare a report which together with the record of the proceedings before him or her shall be submitted to the Board . . .A copy of the examiner's report shall be served by the examiner upon each party [at the hearing]. Each party shall within 10 days. . .file with the Board. . .such exceptions in writing as he or she desires to make to the examiner's findings of fact and conclusions of law. . ."

It is evident, the examiner has the authority to make findings and conclusions of law, which was necessary in Petitioner's case, to determine whether his annuity was to be paid under the 1937 Law or the 1974 Tiering System; while refereee only has authority to make determinations pertaining to computations as A-1 makes clear. Under Parts 260 and 320, there is no requirement for the referee to make available a copy of transcript of hearing. Under §258.6, this is a requirement and was necessary for Petitioner to have to make further appeals. The requirements under §258 and §259 for hearings pertain to the law requiring an examiner capable of making findings pertaining to law; while §260.5 and §320.18 allows the Director of Hearings and Appeals to appoint a referee as it states and further allows -

> ". . . if the Bureau of Hearings and Appeals' caseload dictates, appoint a qualified Board employee, other than a referee assigned to the Bureau of Hearings and Appeals, to act as referee with respect to such a case."

The referee, at the hearing, had full control of the tape recorder. Petitioner was not aware until after he filed PETITION FOR REVIEW to the Sixth Circuit Court of Appeals, October 12, 1985, some two years after the hearing, his testimony on the tape had been blanked out. He did not know until then, the Three-Member Board made its decision without benefit of his testimony. The Board had failed to include in his file, which was secured under 5 U.S.C. §552, February 1985, a copy of the no less than 147 "inaudibles" transcript. He called to the Sixth Circuit Court's attention the "inaudible" transcript but the Court failed to address the issue which denied him his rights under due process. Had he have been given a copy of the "inaudible" transcript" as required under 20 CFR §258.6, he would have had an opportunity to request a Supplemental Hearing. Judgment of the Sixth Circuit Court stated it was made on the transcript of record which would necessarily include the "inaudible" transcript; Petitioner finds this impossible.

20 CFR § 258.7 states:

> "A decision made by at least two members of the Board shall constitute the decision of the Board. The decision of the Board shall be stated in a written opinion filed in the record of the proceedings. A dissenting

> opinion may be stated by a member of the Board who disagrees with the decision of the Board and any such dissenting opinion shall also be filed in the record of the proceedings."

Attachment 2, herein, is a copy of the Board's Decision. The original contained less than four full lines, with "rubber-stamped" signatures affixed thereon, causing Petitioner to question the authenticity of it. This fact was not addressed by the Court; also Petitioner could not appeal the Board's Decision but was required to appeal the referee's decision which should not have been made in the first place; but made by an examiner or the Board pertaining to law. This shows the Board has mishandled his case from the beginning. Part § 259 of Code of Federal Regulations pertains to Appeal of Initial Determination with Respect to. . .Employee Status - which Law petitioner is under, 1937 or 1974. The Appeal of such determination under §259 is made to the Deputy General Counsel of the Board, again pertaining to Law and not computations. Petitioner was denied this appeal process, since the Board has yet to hold a hearing to determine which law he falls under. The Board automatically computed and paid him under the 1974 Tiering System. It has stated both orally and in writing as shown in his file

that all annuitants are put in the computer the same way. Under the 1974 Tiering System, the Board reduces from his Railroad Annuity his FULL Social Security Benefits, leaving him with nothing for the Social Security Retirement Taxes he was required to pay for over 23 years separate and apart from railroad work performed at the same time - or either, after SS of $404.00 is reduced from Railroad $504.80, the railroad only has to pay $100.80 for 23.25 years of railroad work. Under the 1937 Law, Petitioner would have COMBINED his guaranteed railroad pension, 45 U.S.C. §231b(f)(2), plus cost-of-living increases from 1975 forward, plus FULL Social Security Benefits, plus supplemental annuity calculated under 1937 Law at a much higher rate than the $19.18 the Board pays him under the 1974 Act. The Board receives through the Financial Interchange System, by the Secretary of the Treasury and the Social Security Administration, to pay Petitioner each month $243.55 GREATER amount than it pays him.

It is clear the Board has misused the appeal system and has denied Petitioner a fair and just hearing under the required parts of the Code of Federal Regulations. Parts §§258,259 show under AUTHORITY, 45 U.S.C. §228J, the 1937 Law and under SOURCE 43 Federal Register number December

1978, amended November 9, 1983, since 45 U.S.C. § 231b(f)(2), "Grandfather Clause" ceased to be applicable on January 1, 1983, so that Hearings to determine status of employees under 1937 Law were not needed after 1983. Parts §§260,320 show AUTHORITY § 231g, the 1974 Act and SOURCE: August 24, 1982 amended May 9, 1985. It appears that on October 18,1983 when Petitioner's hearing was held the Board had already converted to the Referee System of Hearing and it failed to allow Petitioner his right to a Hearing to determine which law, the 1937 or 1974 Act, he was to be paid under. Since 1983, Petitioner has appealed to the Board, the Three-Member Board, Sixth Circuit Court of Appeals that the Law requires the Board to pay Petitioner under whichever Law he would recieve the higher annuity. This has never been determined because none of the appeals made have addressed the question pertaining to Law only pertaining to computations by the Board. Petitioner has been denied his right under due process. These issues affect thousands of others, depending on annuity checks for their livelihood.

Respectfully submitted,

Jamie E. Coker Arlene C. Coker

1031 Gloria Road
Memphis, TN 38116
(901) 398-1234

JAMIE E. COKER, Petitioner
Arlene C. Coker, Wife and
Attorney-in-Fact

No. 86-1671

SUPPLEMENTAL APPENDIX

DECISION OF THE APPEALS REFEREE

Mr. Jamie E. Coker
1031 Gloria Road
Memphis, Tennessee 38116
May 16, 1984

Decision No. 13,608
Appeal No. 15,127
R.R.B. No. A-721-10-9264

PROCEDURAL HISTORY

On November 10, 1981, the appellant filed an application for a retirement annuity under the provisions of the Railroad Retirement Act. Mr. Coker was found entitled to an annuity effective May 1, 1981. Effective August 1, 1982, Mr. Coker's annuity was reduced because of his entitlement to social security benefits. (The reduction for social security entitlement was subsequently removed because Mr. Coker withdrew his application for social security benefits). In addition, part of Mr. Coker's annuity was withheld due to his earnings in 1981, 1982, and 1983. In April 1983, Mr. Coker filed an appeal from the decision on the amount of his railroad retirement annuity. A hearing was held on his appeal in Memphis, Tennessee on October 18, 1983. The appellant was present at the hearing with his wife, Mrs. Emma Coker. He was represented at the hearing by his attorney, William Gosnell.

ISSUES

There are 2 issues in the appellant's case: 1) Whether his annuity was subject to deductions due to his earnings in 1981, 1982, and 1983; and 2) Whether the amount of his annuity has been properly computed under the provisions of the Railroad Retirement Act.

LAW AND REGULATIONS

Mr. Coker's annuity consists of three components. The first component is provided by section 3(a)(1) of the Act:

> "3.(a)(1) The annuity of an individual under section 2(a)(1) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act if all of his or her service as an employee after December 31, 1936, had been included in the term 'employment' as defined in that Act."

Section 3(b)(1) provides the second component, tier II:

"(b)(1) The amount of the annuity of an individual provided under subsection (a) shall be increased by an amount equal to seven-tenths of 1 per centum of the product which is obtained by multiplying such individual's "years" by such individual's "average monthly compensation" as determined under this subsection. The annuity amount payable to the individual under this subsection shall be reduced by 25 per centum of the annuity amount computed for such individual under subsection (h)(1) or (h)(2), and subsection (h)(5), of this section without regard to section 7(c)(1) of this Act. x x x"

A cost-of-living increase was paid in the tier I effective December 1, 1983. In Public Law 98-76, passed in August 1983, Congress amended section 3(g) to provide a reduction in the tier II portion of an employee annuity. The reduction is not to exceed the cost-of-living increase in tier I. Section 3(g)(2) states:

"(2) The first and, if necessary, the following time or times after January 1, 1983, that monthly insurance benefits under section 202 of the Social security Act are increased, that portion of the annuity of an individual which is computed under subsection (b) of this section as increased under subdivision (1) of this subsection shall, if such individual's annuity under section 2(a)(1) of this Act began to accrue in or before the year in which such first increase under the Social Security Act became effective, be reduced by the dollar amount by which that portion of the annuity provided such individual under subsection (a) of this section was increased, after any reduction under subsection (m) of this section; as a result of such increase or increases under the Social Security Act until the total dollar amount of such reduction or reductions equals 5 per centum of the annuity amount provided such individual under subsection (a), as reduced under subsection (m), prior to such first increase. In no case shall the reduction by reason of this paragraph operate to reduce such portion to an amount less than $10."

Mr. Coker is also entitled to a dual benefit windfall under section 3(h)(1) as follows:

"(h)(1) The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2(a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the amount by which (C) the sum of (i) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, if his service as an employee after December 31, 1936, and prior to January 1, 1975, were included in the term "employment" as defined in that Act and if he had no wages or self-employment income under that Act other than wages derived from such service as an employee, and (ii) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65)or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, exceeds (D) the primary insurance amount to which such individual would have been entitled, upon the attainment of age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of his wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act." (emphasis added).

Subsection 3(h)(5) provides cost-of-living increases in the dual benefit windfall provided by subsections 3(h)(1), (2), (3), or (4) from January 1, 1975 through the earlier of the beginning date of the annuity or January 1, 1982:

"(5) The amount computed under subdivision (1), (2), (3), or (4) of this subsection shall be increased by the same percentage, or percentages, as benefits under the Social Security Act are increased, or would have been increased

had there been no general benefit increases under the Social Security Act, pursuant to the automatic cost-of-living provisions of section 215(1) of that Act, during the period from January 1, 1975, to the earlier of the date on which the individual's annuity under section 2(a)(1) of this Act began to accrue or January 1, 1982."

Section 3(f)(2) (45 U.S.C. b(f)) of the Act is a "grandfather" clause which provides as follows:

"3(f)(2) If, in the case of an individual whose annuity under section 2(a)(1) of this Act began to accrue prior to January 1, 1983, the annuity (before any reduction due to such individual's entitlement to a monthly insurance benefit under the Social Security Act and disregarding any amount provided by subsection (h) of this section) plus the supplemental annuity to which such individual is entitled for any month under this Act, together with the annuity, if any, of the spouse's entitlement to a wife's or hsuband's insurance benefit under the Social Security act and disregarding any amount provided by section 4(e) of this Act, before any reduction under the provisions of section 2(f) of this Act, is less than the total amount which would have been payable to such individual and his spouse for such month, on the basis of the individual's compensation and years of service, under the provisions of the Railroad Retirement Act of 1937 as in effect on December 31, 1974, disregarding for purposes of the computations for any month after December 31, 1974, in excess of one-twelfth of the maximum annual taxable "wages" (as defined in section 3121 of the Internal Revenue Code of 1954) for the calendar year 1974, the annuity of such individual and the annuity of such spouse, if any, shall be increased, without regard to the provisions of subdivision (1) of this subsection, proportionately so as to equal such total amount. For the purpose of computing amounts under this subdivision, the Board shall have the authority to approximate the effect of the reductions prescribed by sections 3(a)(2) and 3(a)(3) of the Railroad Retirement Act of 1937. For purposes of computing amounts payable under the Railroad Retirement Act of 1937, any increases in the amounts determined under the first proviso of section 3(e) of such Act which would have become effective after December 31, 1974, shall be disregarded." (emphasis added).

SUMMARY AND EVALUATION OF THE EVIDENCE

Based on the appellant's income tax records and the testimony at the hearing, the referee found that his net earnings from self-employment were less than the earnings limitations for 1981, 1982, and 1983. After the hearing, Mr. Coker's annuity was recomputed by the bureau of retirement claims to remove the deductions for work, to remove the reduction for social security benefits because the appellant had withdrawn his social security application, and to restore the 15% reduction that had previously been applied to the windfall. Of the accrual due Mr. Coker, $4,464.00 was transferred to the Social Security Administration to repay them for the social security benefits previously paid.

The referee has reviewed the recomputations made in the appellant's annuity by the bureau of retirement claims and finds that his benefits was recomputed to pay him the correct amounts due him under the Railroad Retirement Act from May 1, 1981.

Mr. Coker believes that he is entitled to receive a railroad retirement annuity (including the windfall benefit component) with no reduction for social security entitlement.

The referee finds that Mr. Coker's belief is contrary to the express provisions of the Railroad Retirement Act as enacted by the Congress. Under the Railroad Retirement Act of 1937, the predecessor statute to the current law, an employee who worked in employment covered by the railroad retirement system and also in employment covered by the social security system could receive benefits under both systems. Because of the formula under which those benefits were computed, persons who split their employment between railroad and nonrailroad employment received benefits in excess of the amount they would have received had they not split their employment. This excess is referred to as a dual benefit.

An example of the "windfall" of dual benefits is given by the United States Supreme Court in footnote 1 of Fritz v. Railroad Retirement Board 449 U.S. 168, 101 S. Ct. 456 (1980):

> "For example, if ten years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600.

> The $100 difference in the example constitutes the "windfall" benefit. See generally, S. Rep. No. 93-1163, pp. 2-3 (1974), U.S. Code Cong. & Admin. News 1974, p. 5702; H.R. Rep. No. 93-1345, pp. 2-3 (1974)."

In 1974, Congress restructured the railroad retirement system to eliminate dual benefits. Dual benefits or "windfall" benefits were preserved for certain employees who had a "vested" status. The amount of the windfall benefit was restricted, however, to the windfall amount the employee would have received as of December 31, 1974 or as of the time the employee left railroad service. Mr. Coker last worked in the railroad industry in 1971. He has been self-employed since he left the industry. Because self-employment does not break a "current connection", Mr. Coker qualified for a windfall benefit computed as of December 13, 1974.

The 1974 Act created a two tier system. The first tier or component of an employee's annuity is provided by section 3(a)(1) of the Act. That section provides that the gross benefit will be the amount of the social security benefit the employee would receive if all of his employment after 1936, railroad and nonrailroad, were combined and considered as earnings covered by the Social Security Act. In Mr. Coker's case, his gross tier I benefit, as of December 1, 1983, is $631.00. (631.80 rounded down to 631.00). That amount is based not only on his railroad earnings through 1971 but also on his social security earnings from 1965 to 1980. After reduction for age, his tier I is $504.80.

Section 3(m) of the Railroad Retirement Act expressly requires the amount computed under section 3(a), that is, the amount of the gross tie I benefit, be reduced by the amount of any monthly benefit payable under the Social Security Act. If Mr. Coker becomes entitled to a social security benefit, his tier I benefit will be reduced by the full amount of his social security benefit.

Section 3(b) of the Act provides the tier II benefit, a component based entirely on railroad earnings alone. Mr. Coker was entitled to a tier II benefit of $35.98. Effective December 1, 1983, however, Congress authorized a reduction in the tier II. This reduced Mr. Coker's tier II to $19.18.

Section 3(h) of the Railroad Retirement Act provides for payment of a windfall benefit, which replaces in part the reduction for social security entitlement in tier I. The windfall benefit in Mr. Coker's case restores the dual benefit he would have received as of December 1974. Mr. Coker's windfall was computed by taking the amount of the social security formula benefit he would have received based on his railroad earnings alone through December 31, 1974 (161.20) and adding to it the amount of the social security formula benefit that he would have received based on his social security earnings alone through December 31, 1974 (212.20) and subtracting from that total the amount

of the social security formula benefit he would have received based on combined railroad and social security earnings as of December 31, 1974 ($285.80). The sum of $161.20 plus $212.20 is $373.40. This figure reduced by $285.80 yields the dual benefit of $87.60 as of December 31, 1974. Section 3(h)(5) of the Act provides that the dual benefit shall be increased by the cost of living increases provided by the Social Security Act from January 1, 1975 to the earlier of the date on which the individual's annuity began to accrue or January 1, 1982. Since Mr. Coker's annuity began May 1, 1981, his dual benefit was increased from $87.60 to $142.61 by the cost of living increases due from January 1, 1975 to May 1, 1981. The Act clearly provides no cost of living increase in the dual benefit windfall after May 1, 1981, the beginning date of the annuity.

In summary, Mr. Coker's is entitled to a railroad retirement annuity, as of December 1, 1983, of $638.07. This consists of tier I of $504.80 tier II of $19.18, and the dual benefit windfall of $114.09.

The tier I benefit Mr. Coker receives is based on his combined railroad and social security earnings. If Mr. Coker again becomes entitled to social security benefits, the tier I must be reduced by the full amount of his social security benefit. To do otherwise is to give Mr. Coker 2 social security benefits based on the same earnings, in addition to the windfall benefit. There can be no doubt about Congress' intent as section 3(m) of the Act expressly requires the deduction of the social security benefit.

Congress provided a continuation of windfall benefits based only on earnings through December 31, 1974. Mr. Coker gets a windfall based on his earnings through December 31, 1974. He also received the cost-of-living increases on that windfall from January 1, 1975 through May 1, 1981. There is no provision in the statute to provide him further dual benefits. The Supreme Court of the United States in Fritz v. Railroad Retirement Board, 449 U.S. 166, 101 S. Ct. 453 (1980), upheld the constitutionality of the dual benefit windfall provisions of section 3(h) of the Act, (45 U.S.C. 231b(h).

At the hearing, part of the discussion focused on the "grandfather" clause in section 3(f)(2) of the Act. This subsection is quoted under the law and regulation section of the decision. This section compares the employee's annuity under the 1974 Act before any reduction for social security benefits and without consideration of the windfall, with the amount that would have been payable to the employee on railroad earnings alone under the 1937 Act as of December 31, 1974. Mr. Coker's applicable annuity rate as of December 1, 1983 is $523.98. This is the tier I amount of $504.80 (before reduction of any social security benefit) plus the tier II amount of $19.18. The referee has computed the amount that the employee would have received under the

1937 Act as of December 31, 1974 to be approximately $309.00 (after reduction for social security entitlement). Since Mr. Coker's 1974 Act rate is larger than his 1937 Act rate, he will continue to be paid under the 1974 Act rate. This will not change if Mr. Coker again becomes entitled to social security benefits because section 3(f)(2) clearly requires that the 1974 Act rate to be considered is the amount before deduction of the social security benefit.

No cost-of-living increases are payable on the 1937 Act rate since the section is clear that the 1937 Act rate to be considered is the rate "i in effect on December 31, 1974."

At the hearing, Mr. Coker argued that a Board informational pamphlet (T-1, printed 12-74) gives information which is not consistent with the above. The pamphlet states: "A grandfather clause guarantees that employees and their wives retiring during the eight years following the changeover date of January 1, 1975, will receive no less than the amounts that would have been payable under previous law, excluding social security benefits." As indicated above, Mr. Coker would have received about $309.00 under the previous law. Under the new law he receives $523.98. This is the only comparison the grandfather's clause allows. The pamphlet was misleading to Mr. Coker and this is regretable. The statute, however, is clear and the referee must apply the provisions of the statute as enacted by the Congress. The referee finds that the appellant is receiving the full amount payable to him under the Railroad Retirement Act.

FINDINGS

After careful consideration of the entire record, the appeals referee makes the following findings:

1. The appellant's net earnings from self-employment in the years 1981, 1982, and 1983 were less than the earnings limitations for those years and he is entitled to payment of his annuity for those years without deduction for work.

2. The appellant is receiving the correct amount of benefits under the provisions of the Railroad Retirement Act.

Grace Koester
Appeals Referee

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD

TRANSCRIPT OF BOARD ORDERS

I certify that the following is a true and correct transcript of Board Order Numbered 84-89 issued by the Board on October 22, 1984

(signed) Beatrice Ezerski
Secretary to the Board

B.O. 84-89

DECISION IN RAILROAD RETIREMENT ACT CLAIMS
DOCKET NO. 3196,
JAMIE E. Coker, R.R.B. No. A-721-10-9264

Each memberof the Board having reported that he had examined the record in the appeal of Jamie E. Coker from the decision of the appeals referee and had considered the evidence and argument presented therein, the Board unanimously renders the decision set forth in the opinion of the Board affirming the decision of the appeals referee.

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A TRUE COPY

ATTEST:

Arlene C. Coker
Arlene C. Coker, Wife
Attorney-in-Fact

RAILROAD RETIREMENT BOARD

Appeal of Jamie E. Coker R.R.B. No. A-721-10-9264	)	Railroad Retirement Act Claims Appeal Docket No. 3196

The Board has reviewed the record in the appeal of Jamie E. Coker from the decision of the appeals referee and has considered the argument and evidence contained therein. The Board affirms and adopts the decision of the appeals refereee.

The appeal is denied.

(stamped) R. A. Gielow

(stamped) Earl Oliver

(stamped) C. J. Chamberlain

A TRUE COPY

ATTEST:

Arlene C. Coker

Arlene C. Coker, Wife
Attorney-in-Fact